Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGIA PATSY,

Petitioner,

—VS.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF, FLORIDA INTERNATIONAL UNIVERSITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Board of Regents of the State of Florida ("Board") respectfully opposes petitioner's request for review of the decision of the United States Court of Appeals for the Fifth Circuit. Further, the Board respectfully submits that the petition for a writ of certiorari raises questions that differ from those asserted by petitioner.

QUESTIONS PRESENTED

1. Whether this Court should grant any petition before the lower courts have determined the existence of federal jurisdiction or required Patsy to exhaust state administrative remedies.

2. Whether the Fifth Circuit's adoption of a flexible doctrine concerning the need for prospective § 1983 claimants to pursue state administrative remedies before seeking federal judicial relief conflicts with the holdings of this Court and other Circuits, or with Congressional intent.

3. Whether this Court should grant the petition and summarily vacate the Fifth Circuit's decision with instructions to dismiss Patsy's § 1983 employment discrimination claims for lack of jurisdiction.

4. Whether this Court should accept review and summarily affirm but defer plenary guidance on the important and numerous issues concerning prior resort to state administrative remedies in § 1983 cases un-

til the lower federal courts have had an opportunity to develop a body of common law to provide possible aid to assist in that guidance.

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JURISDICTION

Petitioner bases this Court's jurisdiction on 28 U.S.C. § 1254(1), the statutory provision governing certiorari. Petitioner does not state a basis for, and thus apparently assumes, the existence of federal and subject matter jurisdiction. As is explained in Part III, A, infra, the Eleventh Amendment and the "person" limitation of § 1983 preclude federal court jurisdiction over Patsy's claim. Additionally, the courts lack subject matter jurisdiction to review Patsy's allegations of employment discrimination under § 1983. See Part III, B. Consequently, if the Court grants the writ of certiorari, it should do so for the limited purpose of reviewing the issue of federal jurisdiction. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978); City of Kenosha v. Brumo, 412 U.S. 507 (1973); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Eleventh Amendment, U.S. Constitution, provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1983 (Pet. 2)

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STATEMENT OF THE CASE

Alleging that a policy of "minority preference" or her sex had produced unsuccessful applications for a variety of positions at Florida International University ("FIU")[1], plaintiff-petitioner ("Patsy") filed a § 1983 discrimination suit against her state employer.[2] The defendant-respondent ("Board") moved to dismiss Patsy's claims for judicial relief as foreclosed by the Eleventh Amendment as being premature. Without addressing the alternative jurisdictional grounds, the district court dismissed Patsy's complaint without pre-

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1. One of the nine state universities that comprise the State University System which is operated and managed by the Board of Regents of the State of Florida ("Board"), a corporate state agency, with state-appropriated funds. See pp. a-1 et seq., infra.

2. After the district court dismissed Patsy's initial complaint against FIU for lack of legal capacity to be sued, she filed an amended complaint against the Board. She seeks a "judicial promotion" to the first available and suitable position or $500,000 in damages. (Pet. 3a).

judice for "failure to exhaust administrative remedies." (Pet. 128a). Patsy appealed on the sole ground that the dismissal order violated what she perceived as this Court's ironclad "no exhaustion" rule.[3]

The Fifth Circuit panel agreed with Patsy and reversed per curiam without addressing the Eleventh Amendment issues. (Pet. 126a). The Board's petition for a rehearing en banc of the panel's ironclad "no exhaustion" rule was granted.

After detailed examination of prior decisions of this Court, the en banc majority concluded that resort to administrative remedies could and should "sometimes precede federal court consideration of section 1983 claims."[4] (Pet. 4a-5a). This

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3. Indeed, until the filing of her petition with this Court, Patsy had never challenged the Board's contentions as to the adequacy of her administrative remedies. (Pet. 54a).

4. A conclusion which the majority emphasized was neither foreclosed nor compelled by this Court's precedent. (Pet. 29a-30a).

conclusion was based on more than simply the policy concerns that support the general rule of exhaustion, McKart v. United States, 395 U.S. 185, 193-195 (1969).

The majority also reasoned that an ironclad rule would: a) subject state and federal defendants to disparate treatment for the same alleged violations by imposing unfair burdens on state defendants (Pet. 30a-31a, 41a, 44-46a); b) preclude steps otherwise necessary to insure the "ripeness" of a claim for judicial resolution (Pet. 36a, 46a); and c) adversely affect fundamental notions of federalism and comity (Pet. 46a). Despite these considerations, however, the decision adopted only a flexible exhaustion requirement. (Pet. 50-51a).

Under the Fifth Circuit's ruling, no § 1983 claimant must resort to administrative channels before filing suit unless those remedies satisfy certain "minimum

conditions"[5] and the needs for exhaustion in light of the particular claims asserted must justify their pursuit. (Pet. 51a). Finding the record inadequate to make these determinations in the case sub judice, the Fifth Circuit remanded with instructions to permit plaintiff to amend her complaint and to apply the "principles set forth in [the] opinion" in determining whether prior resort to administrative channels should be required. (Pet. 55a).

Patsy now seeks this Court's discretionary review and summary reversal, vacation, or plenary consideration of this decision. (Pet. 35, 44) Reading it to

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5. "First, an orderly system of review or appeal must be provided by statute or written agency rule. Second, the agency must be able to grant relief more or less commensurate with the claim. Third, relief must be available within a reasonable period of time. Fourth, the procedures must be fair, and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims. Fifth, interim relief must be available, in appropriate cases, to prevent irreparable injury and to preserve the litigant's rights under section 1983 until the administrative process has been concluded." (Pet. 50a).

require "all § 1983 plaintiffs [including herself to] exhaust state administrative remedies," Patsy submits that the decision conflicts with an inexorable "no exhaustion" rule of this Court and other circuits or with the "adequacy holding" of McNeese v. Board of Education, 373 U.S. 668 (1963), and with Congressional intent. (Pet. i-ii) For all the following reasons the Board respectfully opposes Patsy's petition.

SUMMARY OF REASONS FOR OPPOSING THE PETITION

I. The petition warrants this Court's denial for two reasons:

A. The Fifth Circuit's remand and the unresolved jurisdictional issues render the petition untimely if not premature. The district court must determine if Patsy should first pursue administrative remedies and, if so, for what reasons. For example, the Fifth Circuit has directed inquiry as to whether Patsy's conclusory claims are ripe for adjudication before seeking administra-

tive relief. The resolution of that issue will also involve the initial finding as to the adequacy of administrative remedies. Thus, the perceived "adequacy" holding of McNeese v. Board of Education, supra, hardly presents a timely reason for review. Of greater importance, the lower courts have yet to determine the existence of federal jurisdiction in light of the Board's status under the Eleventh Amendment and § 1983. While this Court could grant the petition and resolve these issues itself, their initial consideration below would develop a better if not essential record for that potential review.

B. The decision's flexible exhaustion rule presents no real conflict questions. For actual conflict to exist, this Court must have established an ironclad "no exhaustion" rule. For the reasons respectfully outlined in the decision below and by both the Second and Seventh Circuits, no

such rule exists. Moreover, the Fifth Circuit's decision rests on several reasons which neither this Court, nor the other Circuits, have ever fully addressed, let alone rejected.

Additionally, the decision furthers rather than violates the Congressional intent embodied in § 1983 (Pet. 40a), and this Court has repeatedly refused to make states silent partners in our federal system for the protection of Constitutional rights. Indeed, Congress has recently outlined specific procedures that suggest the propriety of prior state administrative involvement before an employment discrimination claimant such as petitioner may seek federal judicial relief. While 42 U.S.C. § 1997e outlines "standards" not identical to the "conditions" in the decision below, it neither precludes the rule provided by the Fifth Circuit nor applies to Patsy, who can hardly be considered a prisoner or

"institutionalized."[6] More importantly, neither that statute nor its legislative history properly support the implication that Congress intended to preclude judicial inquiry into the possible needs for exhaustion in other contexts. Of course, the Fifth Circuit decision arguably encompasses prisoner § 1983 claims. However, this case clearly does not present the need for any possible modifications. In any event, no "will of Congress," imagined or expressed, can extend federal jurisdiction to claims not ripe for adjudication.

II. Should this Court elect to pretermit initial resolution of jurisdictional issues by the lower courts, the Board respectfully submits that the Court should summarily vacate the decision below with instructions to dismiss for the following reasons:

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6 Indeed, it is noted in passing that Patsy recently enjoyed the "freedom" to request and have granted a six-month leave of absence.

A. The Board's Eleventh Amendment and "non-person" status under § 1983 preclude federal jurisdiction. As an "arm of the state" the Board enjoys an unwaived and unabrogated immunity from federal suit under the Eleventh Amendment and "non-person" status under § 1983.

B. Title VII provides Patsy's exclusive relief for alleged employment discrimination. As with § 1985, § 1983 provides claimants only a remedy - not any substantive rights. As the relief Patsy seeks falls within the detailed statutory framework of Title VII, that provision constitutes her exclusive remedy.

REASONS FOR OPPOSING THE PETITION

I. THE PETITION LACKS PROCEDURAL RIPENESS AND THE LOWER COURTS HAVE YET TO DETERMINE THE EXISTENCE OF FEDERAL JURISDICTION OVER PETITIONER'S CLAIMS ON GROUNDS BOTH RELATED AND UNRELATED TO THE EXHAUSTION ISSUE.

Whether Patsy must pursue administrative remedies, and, if so, for what reasons

must await further proceedings on remand. The Fifth Circuit's decision has not imposed an exhaustion requirement on Patsy, and the district court could find exhaustion unwarranted in this case. Brotherhood of Locomotive Firemen and Enginemen v. Bangor Aroostook Railroad Co., 389 U.S. 327 (1967). Granted, the potential mootness of Patsy's standing to challenge the Fifth Circuit's flexible rule does not preclude the writ. See generally Securities Exchange Commission v. Sloan, 436 U.S. 103 (1978); Zablocki v. Redhail, 434 U.S. 374 (1978); but see Dupris v. United States, ___ U.S. ___, 64 L. Ed. 2d 836 (1980); Patterson v. Warner, 415 U.S. 303 (1974). However, further proceedings will create a more complete if not necessary record of the potential reasons for exhaustion. Indeed, one of the potential reasons for prior resort to administrative relief would be to insure the "ripeness" of Patsy's claims for

adjudication[7]. Moreover, further proceedings will allow the lower courts to address the jurisdictional issues concerning the Board's status under the Eleventh Amendment and § 1983. See Discussion, pp. 23-24, infra. Of course, this hardly precludes this Court from addressing these issues in the first instance. Edelman v. Jordan, 415 U.S. 651, 667 (1974). However, their initial resolution by the lower courts will, again, permit a more thorough and expeditious review.

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7. Patsy's complaint (See Record Excerpts Assembled by Defendant-Appellee, pp. 38-60) contains no allegations of Board policy or involvement in the alleged discrimination. Athough Patsy has sued the Board because FIU lacks the capacity to be sued, she nevertheless seeks to hold the Board accountable for the alleged discrimination. As respondeat superior fails to provide an adequate predicate for liability, Monell v. Department of Social Services, 436 U.S. 658 (1978) exhaustion may be particularly appropriate to assure the ripeness of these claims for adjudication. See also, Parratt v. Taylor, ___ U.S. ___, 49 U.S.L.W. 4509, 4511, n.3 (1981).

II. THE DECISION BELOW FAILS TO PRESENT ANY REAL CONFLICT QUESTIONS:

A. No Actual Conflict Exists Between The Decision Below And Prior Holdings Of This Court Or Other Circuits

Unless this Court has established an ironclad rule precluding the need for prospective § 1983 claimants to resort to administrative remedies under any circumstances, no actual conflict exists. For the reasons respectfully outlined in the decision below, no decision of this Court has fully addressed the need for, let alone required, such a blanket rule. (Pet. 13a-31a). Moreover, in adopting a flexible, analytical rule, the decision below rests on several reasons which this Court has neither considered nor rejected.[8] Cf.

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8 For example, the proposition that exhaustion may be necessary to insure "institutional finality" and "ripeness" of a claim for adjudication has not been addressed by this Court. Stevenson v. Board of Education, 426 F.2d 1154, 1157 (5th Cir.) cert. denied, 400 U.S. 457 (1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970). Patsy contends in conclusory fashion that

United States v. Rands, 389 U.S. 121, 125 (1967). Hence, the alleged conflict with this Court's holdings and those by other Circuits[9] is apparent - not real.

B. The Decision Below Does Not Conflict With Congressional Intent

Patsy's extensive reliance upon the perceived negative implications of 42 U.S.C. § 1977e is misplaced. Whether or not the views of a later Congress are probative in interpreting an earlier statute, compare United States v. Southwestern Cable Co.,

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FIU practices a policy of "minority preference" which resulted in "reverse discrimination" concerning her promotion opportunities. However, the Board has a written policy prohibiting employment discrimination and possesses the power to remedy any deviations from that policy. See, Record Excerpts Assembled by Defendant-Appellee, pp. 38-60, 67.

9 None of the other Circuit cases cited by Patsy (Pet. 13-14 n.6) or the decision below (Pet. 31a-36a) support an ironclad "no exhaustion" rule for substantive reasons that conflict with the Fifth Circuit's adoption of a flexible rule. Analysis of those decisions reveals that they merely rely on the Supreme Court cases distinguished by the Fifth Circuit.

392 U.S. 157 (1968) and Haynes v. United States, 390 U.S. 85 (1968) with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), analysis of the subsequent legislation relied on by Patsy demonstrates that Congress has not limited judicial discretion to impose an exhaustion requirement under § 1983. See also Parratt v. Taylor, ___ U.S. ___, 49 U.S.L.W. 4509, 4516, n.13 (1981) (Powell, J., concurring). Patsy's contention is necessarily premised on the implicit assumption that Congress considered and rejected any exhaustion limitation in every situation where it has not imposed that requirement, and particularly in every § 1983 context other than that addressed by § 1997. This premise misconstrues the breadth of § 1997e as well as the nature of the legislative process, and would effectively nullify all judicially imposed exhaustion limitations on federal statutory provisions. See, e.g., Renegotiation Board

v. Bannercraft Clothing Co., 415 U.S. 1 (1974); McGee v. United States, 402 U.S. 479 (1971); cf. Vaca v. Sipes, 386 U.S. 171 (1967).

Congress enacted the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, in 1980, for the express purpose of empowering the Justice Department to bring suit to remedy violations of the constitutional rights of persons institutionalized in prisons and other state facilities. Section 1997e requires that state administrative remedies be exhausted prior to bringing suit if those remedies comply with certain standards. This provision, however, was not given extensive consideration by either the opponents or supporters of the legislation. The extensive hearings preceding the bill's passage centered on other issues.

In any event, it appears the principal reason for the exhaustion provision's

inclusion in the Act was to provide an incentive for states to improve their ability to protect the rights of the institutionalized. S. Rep. No. 96-416, 96th Cong., 2d Sess., Senate Judiciary Committee (Nov. 15, 1979) at pp. 1-3. As noted in the Senate report, "[t]he demonstrated failure of numerous states to fulfill their constitutional obligations to their institutionalized citizens . . . makes Federal enforcement of such obligations both appropriate and necessary." Id., at 19. Patsy's perceived intent of Congress to preclude resort to administrative remedies in other § 1983 contexts "blinks in the face of the obvious."[10] Indeed, as noted by Congress in enacting § 1997:

> Federal Courts have punctiliously avoided precipitous intervention

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10 In contrast to its conclusions regarding the institutionalized, Congress has not suggested that states have inadequately protected the rights of their employees. Patsy characterizes the various state remedies related to § 1983 as "time-consuming, (continued on next page)

> in State affairs, allowing defendants the greater possible leeway in divising methods to bring their institutions up to constitutionally accepted standards. Only when state officials have failed to comply with constitutionally mandated judicial orders have Federal Courts imposed specific requirements for institutional operations.

Id., at 25; See generally, Stone v. Powell, 428 U.S. 465, 492, n.35 (1976).

Congress is clearly aware that the courts originated the doctrine of exhaustion of administrative remedies and have had

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often ineffective, and nearly always inadequate." (Pet. 13). The evidence before Congress in enacting § 1997, however, was limited exclusively to the lack of adequate state procedures available to the institutionalized; none of the evidence reviewed by Congress supports Patsy's criticism. Additionally, as demonstrated by the fact that the administrative procedures provided by Florida are designed to protect Patsy's rights, the circumstances existing when § 1983 was passed or even when Title VII was enacted no longer exist today. States deserve the opportunity to utilize the effective administrative procedures they have worked to implement. Certainly the deferral scheme of Title VII is intended to support such state initiative. 42 U.S.C. § 2000e-5(b) (1974). If exhaustion of adequate state administrative remedies is not required, a disincentive to provide simple, effective administrative relief is substituted for the incentive supplied by § 1997.

extensive experience in its application. Congress chose to enact § 1997e because of the perceived inability of the courts to require exhaustion in a context that clearly warranted it. Moreover, in enacting § 1997e, supporters of the bill stated that exhaustion served several purposes, including: (1) exhaustion would reduce the substantial backlog in the federal court system caused by § 1983 cases; (2) an exhaustion requirement should induce each state to carefully concern itself with the rights of persons within its province; (3) exhaustion would permit the state agencies to frame the issues and supply a record to a court, should judicial proceedings eventually be necessary; and (4) exhaustion will enable state agencies to gain further expertise in the areas involved. S. Rep. No. 96-416, supra at 34; H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. (Apr. 22, 1980) at 15, 16.

The decision below is based in part on, and advances, the same considerations.

In sum, neither § 1997e nor its legislative history evidences a Congressional intent to disapprove of either exhaustion in other § 1983 contexts or the reasons articulated below in adopting a flexible rule. Indeed, the purposes of § 1997e coupled with the express exhaustion requirements applicable to employment discrimination claims under Title VII cogently suggest that Congress would welcome - not reject - the flexible rule adopted below. Unlike Jenkins v. Brewer, ___ U.S. ___, 49 U.S.L.W. 3616 (1981), this case presents no need for reconsideration or modification of the decision below in light of §1997e as Patsy is not "institutionalized." In any event, the "standards" imposed by § 1997e (Pet. 134a-135a) are fairly encompassed by the minimum "conditions" outlined in the decision below. (Pet. 50a) In fact, in several

respects, the Fifth Circuit's rule provides a complainant with more protection than the administrative standards of § 1997. Finally, in addition to the more telling legislative intent reflected in the deferral scheme of Title VII, recent decisions of this Court hardly reflect an intent to preclude state resolution and protection of constitutional rights. E.g., Stone v. Powell, supra; Allen v. McCurry, ___ U.S. ___, 66 L.Ed.2d 308 (1980). Given these circumstances, effective state administrative remedies should be embraced rather than indicted.

C. The Decision Below Does Not Present A Question Of Conflict With This Court's Decion in McNeese v. Board of Education.

The Fifth Circuit has not directed Patsy to pursue any administrative remedies, let alone those she perceives as condemned by McNeese, supra. Moreover, the appellate court's silence on the issue of "burdens" can hardly be construed as conflicting with

perceived law on the subject. In any event, Patsy's reliance upon McNeese is misplaced.

Patsy's contention that McNeese requires the state to prove the adequacy of its administrative remedies is not clearly supported by the decision. Additionally, the Board disputes Patsy's contention that personnel involved in the remedies available to her are, like those persons in McNeese, not empowered to grant relief. Unlike the state administrators in McNeese, FIU officials have the right and ability to remedy a complaint rather than to merely recommend a solution.[11] However, as Patsy never

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11 Even if Patsy's contention to the contrary were true, the Board submits that the remedies below are not "inadequate." The standards of adequacy need not necessarily be measured by the enforceability of a final administrative determination. Neither the standards articulated in § 1997 nor the scheme established by Title VII provide for an enforcement mechanism outside the court system. Additionally, one of the central purposes of an administrative system is to effectively resolve a significant number of the complaints with which it deals; it clearly is not required to remedy every claim it addresses.

raised this argument below, the Board - irrespective of the nature of its burden of proof - never had an opportunity to dispute this or any other belated factual contention through evidence or argument. Accordingly, this issue should not be addressed at this time, United States Parcel Service, Inc., v. Mitchell, ___ U.S. ___, 67 L.Ed. 2d 732, 738, n.2 (1981); Dothard v. Rawlinson, 433 U.S. 321, 323, n.1 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n.2 (1970), but left for resolution in the trial court, as the Fifth Circuit's remand properly directed. The question of adequacy is highly factual in nature and should be treated first by the district court, if for no other reason than to provide a sufficient record for later resolution on appeal. Jenkins v. Anderson, ___ U.S. ___, 65 L.Ed. 2d 86, 92, n.1 (1980).

III. THE FEDERAL COURTS LACK JURISDICTION OVER PATSY'S § 1983 EMPLOYMENT DISCRIMINATION CLAIMS AGAINST THE BOARD

Should this Court grant the writ, the Board respectfully submits that review should be limited to the jurisdictional issues discussed below and this Court should vacate the Fifth Circuit's decision with instructions to dismiss Patsy's suit for lack of jurisdiction.

A. The Board's Eleventh Amendment and Non-Person Status Under § 1983 Preclude Federal Jurisdiction.

The Florida statutory provisions outlined in relevant part in the Appendix reflect the Board's status as an "arm of the state" for Eleventh Amendment purposes. Florida Dept. of Health v. Florida Nursing Home Ass'n, ___ U.S. ____, 67 L.Ed. 2d 132 (1981); Quern v. Jordan, 440 U.S. 332 (1979); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Mt. Healthy City Bd. of Ed. v.

Doyle, 429 U.S. 274, 280 (1977).[12] Accordingly, it enjoys unwaived and unabrogated immunity from suit in federal court, and Monell v. Department of Social Services, 436 U.S. 658 (1978) clearly does not affect its "non-person" status under § 1983.[13]

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12 See also Whiting v. Jackson State Univ., 616 F.2d 116, 127, n.8 (5th Cir. 1980); Martin v. Louisville, 541 F.2d 1171 (6th Cir. 1976); Vaughn v. Regents of the University of California, 504 F. Supp 1349 (E.D. Cal. 1981); Weisbord v. Michigan State Univ., 495 F. Supp. 1347 (W.D. Mich. 1980); Selman v. Harvard Medical School, 494 F. Supp 603 (S.D.N.Y. 1980), aff'd. 636 F.2d 1204 (2d Cir. 1981); Zentgraf v. Texas A&M Univ., 492 F. Supp 265 (S.D. Tex. 1980); Hart v. University of Texas, 474 F. Supp 465 (N.D. Tex. 1979); Henry v. Texas Tech. Univ., 466 F. Supp. 141 (N.D. Tex. 1979); Byron v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975).

13 The Board's status as part of the state also compels the conclusion that it is not a "person" subject to suit under § 1983. Monell, supra, overruled Monroe v. Pope, 365 U.S. 167 (1961) only insofar as it had immunized local governments, municipal corporations and local independent school boards from suit under § 1983. The Court explicitly noted that its decision did not affect the status of governmental units which are "considered part of the state for Eleventh Amendment purposes." Id. at 690, n.54. Additionally, the fact that Patsy has sued the Board, for and on behalf of FIU, does not alter this conclusion. As a legal non-entity, clearly FIU lacks "person" status. Moreover, FIU is still part of the state for Eleventh Amendment purposes. See university cases cited at note 12, supra.

B. Subject Matter Jurisdiction Over Patsy's Employment Discrimination Claims Does Not Properly Lie Under § 1983.

Petitioner's claim of discrimination clearly relates to the terms and conditions of her employment, and as such constitutes an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Petitioner has never, however, filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or otherwise attempted to invoke the detailed administrative procedures and salutory policies of that Act. Her attempted avoidance of the Title VII administrative scheme by seeking immediate relief under § 1983 should not be condoned.

In Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979), this Court held that § 1985 of the Civil Rights Act of 1871 could not be invoked to redress violations of Title VII. Like § 1985, § 1983 creates no substantive

rights.[14] Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979). Thus, any employment-related suit brought under either statute is nothing more than the assertion of a Title VII right in an alternative remedial framework. If permitted, "a complainant could avoid most if not all of [the] detailed and specific provisions of [Title VII]" including the crucial administrative process that is central to the Act. Clearly Congress did not contemplate such a result.

The analysis in Novotny is supported by other contexts. The importance of the administrative process of Title VII was relied upon in Brown v. General Services

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14 This court's holding in Johnson v. Railway Express Agency, 421 U.S. 454 (1985), that 42 U.S.C. § 1981 provides a remedy independent from Title VII is not affected by the argument herein or the result in Novotny. Unlike §1983 or §1985, §1981 does create substantive rights. See Novotny, supra at 377; Setser v. Novack Investment Co., 638 F.2d 1137, 1147 (8th Cir. 1981).

Administration, 425 U.S. 820 (1976) to hold that § 717 of the Act is the exclusive judicial remedy available to a federal employee alleging job-related discrimination. It has also been held, for example, that a narrowly tailored employee compensation scheme precludes suit under a general tort statute, e.g., United States v. Denko, 385 U.S. 149 (1966); Patterson v. United States, 359 U.S. 495 (1959), a carefully constructed venue statute in patent cases pre-empts a general venue statute, Stonite Products Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942), and the anti-trust provisions of the Robinson-Patman Act, 15 U.S.C. § 13a cannot be enforced through the framework of the Federal Alcohol Administration Act, 27 U.S.C. § 205, National Distributing Co. v. United States Treasury Dept., 620 F.2d 997 (D.C. Cir. 1980).

In sum, the conclusion as to lack of subject matter jurisdiction reached in

Novotny under § 1985 must also be applied to Patsy's § 1983 claim if the administrative procedures of Title VII are to serve their intended purpose. Thus far the courts which have addressed the issue unanimously support this result. Hall v. Board of County Commissioners, 509 F. Supp. 841, 848 (D. Md. 1981); Grate v. Grand Strand Water and Sewage Authority, [1981] 25 Empl. Prac. Dec. (CCH) ¶ 31,781 (D.S.C. 1981); LeBoeuf v. Ramsey, 503 F. Supp. 747, 754 (D. Mass. 1980); see also Meyerson v. Arizona, 507 F. Supp. 859, 864 (D. Ariz. 1981).

CONCLUSION

As a matter of ever-increasing importance, the exhaustion doctrine in § 1983 cases will undeniably require this Court's plenary review and guidance. The Board submits, however, that this petition should not present that occasion.

The present record in this case and its posture below reveal that important

jurisdictional issues and questions helpful if not essential to plenary review of the exhaustion doctrine have yet to be addressed. Accordingly, the Board submits that the petition should be denied or, if granted, that this Court vacate the decision below with instructions to dismiss petitioner's claims for lack of jurisdiction. Should review be accepted and the decision not vacated for jurisdictional reasons, the Board would respectfully suggest that this Court summarily affirm the Fifth Circuit's flexible rule at least insofar as it relies upon the absence of an ironclad rule to preclude it. Mandel v. Bradley, 432 U.S. 173, 175-177 (1977).

The "entire spectrum of conceivable constitutional violations . . ." can render ironclad answers to some questions arising under § 1983 "elusive" at best. Baker v. McCollan, 443 U.S. 137, 139-140 (1979). The "exhaustion of administrative

remedies" question belongs in that category unless "important interests . . . [are to be] sacrificed on [the] altar of [an expedient, ironclad rule]." (Pet. 37a-38a). However, wedded to "black letter" statements by this Court which suggest an "ironclad" rule, the lower federal courts have generally failed to develop a body of common law concerning exhaustion in §1983 cases. Of course, this Court could confirm the propriety of this gap in federal jurisprudence by granting the petition and summarily vacating the decision. However, for the reasons outlined by the Fifth Circuit, the Board most respectfully suggests that the decision below be summarily affirmed and the lower courts left to develop a body of § 1983 exhaustion law for possible aid to

this Court in providing subsequent plenary guidance.

Respectfully submitted,

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APPENDIX

FLA. STAT. ANN. § 20.15 (West 1977)

DEPARTMENT OF EDUCATION

There is created a department of education.

(1) The head of the department of education is the state board of education composed of the governor and cabinet as specified in section 2, article IX of the state constitution. The governor is chairman of the board, and the commissioner of education is the secretary and executive officer and in the absence of the governor shall serve as chairman . . .

. . . .

(2)(a) The following divisions of the department of education are established:

. . .

(4) Division of Universities.

(3) The Board of Regents is the director of the Division of Universities pursuant to chapter 240. The directors of all other divisions shall be appointed by the commissioner subject to approval by the state board.

FLA. STAT. ANN. § 216.023 (West 1977) LEGISLATIVE BUDGET REQUESTS TO BE FURNISHED BY AGENCIES.

(1) The head of each agency, except the state courts system as defined in s. 25.382, shall submit a final legislative budget request to the Legislature and to the Governor, as chief budget officer of the state, in the form and manner prescribed in the budget instructions and at such time as specified by the Executive Office of the Governor, based on the agency's independent judgment of its needs. However, no state agency shall submit its final legislative budget request later than November 1 of each even-numbered year.

FLA. STAT. ANN. § 216.031 (West 1971)

BUDGETS FOR OPERATIONAL EXPENDITURES

The legislative budget requests submitted by the head of each state agency, showing the amounts requested for operational expenditures during the next biennium, shall contain the following:

(1) For each budget entity, a summary exhibit showing for each appropriate category, for each fund, 2 prior years' appropriations for general revenue, 1 prior year's actual and 1 current year's estimated expenditures, and the requested expenditures for each year of the next biennium. The total number of positions for the budget entity shall be shown for each fiscal year of data for which positions are authorized, fixed, or requested. However, the agency

budget request for the State University System shall be expressed in terms of the amounts for the various programs as prescribed in s. 240.271 and in terms of the specified appropriate categories, including the special units' budgets, prescribed in the prior appropriations act.

FLA. STAT. ANN. § 240.205 (West 1977)

BOARD OF REGENTS INCORPORATED

The Board of Regents is hereby created as a body corporate with all the powers of a body corporate for all the purposes created by, or that may exist under, the provisions of this chapter or laws amendatory hereof and shall:

(1) Have a corporate seal.

(2) Elect a corporate secretary.

(3) Have and employ a staff attorney and other authorized personnel.

(4) Have a power to contract and be contracted with, to sue and be sued, and to plead and be impleaded in all courts of law and equity.

(5) Receive donations.

(6) Make purchases of real and personal property and contract for the sale and disposal of same, but the title to all real property, however acquired, shall be vested in the

Board of Trustees of the Internal Improvement Trust Fund and shall be transferred and conveyed by it.

FLA STAT. § 240.209 (1979)

BOARD OF REGENTS; POWERS AND DUTIES.

(1) The Board of Regents is primarily responsible for adopting systemwide rules and policies; planning for the future needs of the State University System; planning the programmatic financial, and physical development of the system; reviewing and evaluating the instructional, research, and service programs at the universities; coordinating programs development among the universities; and monitoring the fiscal performance of the universities.

. . .

(3) The board shall:

. . .

(c) Review the legislative budget requests, including fixed capital outlay requests, from each

university, and subject to provisions of applicable law, present an aggregated budget for the State University System with recommendations for modifications to each university's budget request. The board shall provide to the individual universities fiscal policy guidelines, formats, and instructions for each budget request, developed in accordance with chapter 216 and s. 235.41.

FLA. STAT. § 240.2011 (1979)

STATE UNIVERSITY SYSTEM DEFINED.

The State University System shall consist of the following:

(1) The Board of Regents of the Division of Universities of the Department of Education, with a central office located in Leon County.

(2) The University of Florida, with a main campus located in Leon County.

(3) The Florida State University, with a main campus located in Leon County.

(4) The Florida Agricultural and Mechanical University, with a main campus located in Leon County.

(5) The University of South Florida, with a main campus located in Hillsborough County.

(6) The Florida Atlantic University,

with a main campus located in Palm Beach County.

(7) The University of West Florida, with a main campus located in Escambia County.

(8) The University of Central Florida, with a main campus located in Orange County.

(9) The University of North Florida, with a main campus located in Duval County.

(10) The Florida International University, with a main campus located in Dade County.

FLA. STAT. ANN. § 240.217 (West 1977)
BOARD EMPOWERED TO EXERCISE RIGHT OF EMINENT DOMAIN

Whenever it becomes necessary for the welfare and convenience of any of its institutions or divisions to acquire private property for the use of said institutions, and the same cannot be acquired by agreement satisfactory to the Board of Regents and the parties interested in, or the owners of, said private property, the Board of Regents may exercise the right of eminent domain, and proceed to condemn the property in the manner provided by chapter 73.

FLA. STAT. ANN. § 240.281 (West 1977)

DEPOSIT OF FUNDS RECEIVED BY INSTITUTIONS AND AGENCIES IN THE STATE UNIVERSITY SYSTEM

All funds received by any institution or agency in the State University System, from whatever source received and for whatever purpose, shall be deposited in the State Treasury subject to disbursement in such manner and for such purposes as the Legislature may by law provide. The following funds shall be exempt from the provisions of this section and, with the approval of the Board of Regents may be deposited outside of the State Treasury:

(1) Student deposits.

(2) Scholarship funds from private sources.

(3) Student loan funds.

(4) Contractor's bid deposits.

(5) Vending machine collections.

(6) Alumni association funds.

(7) Funds received from private sources as gifts, grants, bequests or donations.

(8) Such other funds as may be approved by the Board of Regents and the Executive Office of the Governor.